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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),
Petitioners,

vs.

NEW YORK DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION AND FINANCE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE ON BEHALF OF DOW CHEMICAL COMPANY, SHELL OIL COMPANY, HAWAIIAN TELEPHONE COMPANY, THE CHAMBER OF COMMERCE OF HAWAII, HOSPITAL ASSOCIATION OF HAWAII, HAWAII EMPLOYERS' COUNCIL, PEARL HARBOR FEDERAL CREDIT UNION AND EWARD D. SULTAN CO., LTD.

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TABLE OF CONTENTS

PAGE

I. Interest of the Amici Curiae 2

II. Questions Presented 5

III. Summary of the Argument 6

IV. Argument 8

A. Free Collective Bargaining Without Government Interference Is Essential to the Federal Labor Scheme 8

B. A State Statute That Predicates the Payment of Unemployment Compensation to Striking Employees Upon Their Status as Strikers Constitutes an Impermissable Reevaluation of the Balance Between Labor and Management Under the Federal Labor Scheme 10

C. The Disbursement of Unemployment Compensation Benefits in Fact Obstructs the Collective Bargaining Process 13

D. The States Have Not Been Authorized to Modify the Balance of Interest Struck by Congress.... 21

1. The New York Statutes Fall Within the Ambit of the Supremacy Clause 22

2. Congress Never Intended That the States Would Compensate Strikers 23

3. The Court of Appeals Misconstrued the Legislative History 28

V. Conclusion 34

Table of Authorities

Cases

Amercian Broadcasting Cos. v. New York State Dept. of Labor, 77 C. 2995 (S. D. N. Y. June 30, 1977) 21

American Shipbuilding Co. v. N. L. R. B., 380 U. S. 300 (1965) 8

Batterton v. Francis, 432 U. S. 416 (1977) 29

Brotherhood of Ry. and S. S. Clerks, Freight Handlers, Exp. and Station Employees Union v. Railroad Retirement Board, 239 F. 2d 37 (D. C. Cir. 19756) 24-25, 29

Calif. Dept. of Human Resources Development v. Jova, 402 U. S. 121 (1971) 28

Carter v. Carter Coal Co., 298 U. S. 238 (1936) 23

Delaware Coach v. Public Service Commission, 265 F. Supp. 648 (Del. 1967) 9

Detroit & Toledo Shoreline Rail Co. v. United Transport Union, 396 U. S. 142 (1969) 29

Dow Chemical Co. v. Taylor, 57 F. R. D. 105 (E. D. Mich. 1972) 21

Dow Chemical Co. v. Taylor, 428 F. Supp. 86 (E. D. Mich. 1977), certified to 6th Cir. (E. D. Mich. May 19, 1977) (No. 77-8064) 3, 15

Francis v. Davidson, 340 F. Supp. 351 (Md. 1972) aff'd 409 U. S. 904 .....24, 29

General Electric Company v. Callahan, 294 F. 2d 60 (5th Cir. 1961), appeal dismissed, 369 U. S. 832 (1962) 9

Grand Rapids City Coach Lines v. Howlett, 137 F. Supp. 667 (W. D. Mich. 1955) 9

Great Lakes Steel Corp. v. Employment Security Commission, 281 Mich. 249, 161 N. W. 2d 14 16

Grinnell Corp. v. Hackett, 475 F. 2d 449 (1st Cir. 1973) 7, 13, 21, 22, 33

Hawaiian Telephone Co. v. State of Hawaii Dept. of Labor and Indus. Rel., 405 F. Supp. 275 (O. Hawaii 1975) *appeal docketed* (9th Cir. March 19 and May 12, 1976) (Nos. 76-1584, 76-2056) 4, 18, 19, 20, 21, 26

H. K. Porter v. N. L. R. B., 397 U. S. 99 (1970) 8, 9

People v. Federal Tool & Plastics, 62 Ill. 3rd 542, 344 N. E. 2d 1 (1975) 6

ITT Lamp Division v. Minter, 435 F. 2d 989 (1st Cir. 1970), *cert. den.* 402 U. S. 933 (1971), *reh. den.* 404 U. S. 874 (1971) 7

John Hancock Mutual Life Insurance Co. v. Commissioner of Insurance, 349 Mass. 390, 208 N. E. 2d 516 (1965) 9

Lodge 76, I. A. M. v. Wisconsin Employment Rel. Comm., 427 U. S. 132 (1976) .....*passim*

Local 24, International Brotherhood of Teamsters v. Oliver, 358 U. S. 283 (1959) 8, 11

Malone v. White Motor Corp., 98 S. Ct. 1185 (1978) ..32, 33

Matson Terminals v. California Employment Commission, 24 Cal. 2d 695, 707 (1944) 30

Munn v. Illinois, 94 U. S. 113 (1877) 32

Nash v. Florida Industrial Comm., 389 U. S. 235 (1967) 6, 7, 13, 22, 23

N. L. R. B. v. Fleetwood Trailer Co., 389 U. S. 375 (1967) 10

N. L. R. B. v. Drivers Local Union No. 639, 362 U. S. 274 (1960) 32

N. L. R. B. v. Insurance Agents Union, 361 U. S. 477 (1960) 8

New York Telephone Co. v. New York State Department of Labor, 434 F. Supp. 810 (S. D. N. Y. 1977) 14, 15

New York Telephone Co. v. New York State Department of Labor, 566 F. 2d 388, 395 (2d Cir. 1977) 14

Ohio Bureau of Employment Services v. Hodory, 431 U. S. 471 (1977) 29

Oil, Chemical & Atomic Workers v. Arkansas Louisiana Gas Co., 332 F. 2d 64 (10th Cir. 1964) 9

Retail Clerks, Local 1625 v. Schmermerhorn, 375 U. S. 96, 103 (1963) 33

Schecter Poultry v. U. S., 295 U. S. 495 (1935) 23

Sears, Roebuck and Co. v. San Diego County Dist. Council of Carpenters, 46 U. S. L. W. 4446, 4450-4451 (May 15, 1978) (No. 76-750) 6

Shell Oil Co. v. Brooks, No. C74-1935 (W. D. Wash.) .. 4

Southwestern Electric Power Co., 216 N. L. R. B. 522 (February 14, 1974) 13

Teamsters, Local 20 v. Morton, 337 U. S. 252 (1964) 9, 11, 12

Statutory Materials

D. C. C. § 46-310(f), Act. of Aug. 28, 1935, ch. 794 25

Haw. Rev. Stat. Ch. 383-30(4), 383.29 *et seq.* 11

Mich. Comp. Laws Ann. § 421.29(8) 3, 11, 16

N. Y. Labor Law [McKinney 1977]:

§ 590.9 14

§ 592.1 ..... 10, 14

Wash. Rev. Code § 50.20.090 (1974) 11, 17

National Labor Relations Act, 29 U. S. C. §§ 141 *et seq.* ..... *passim*

National Labor Relations Act, 29 U. S. C. § 152(2), (14) 2

P. L. 65, 57 Stat. 100 (June 4, 1943) 25

P. L. 91-671, 84 Stat. 2048 (1971) 24

P. L. 271, § 903(a)(5) 24

P. L. 386, 49 Stat. 946 (August 20, 1935) 25

P. L. 721-68 Stat. 988 (August 31, 1954) 25

7 U. S. C. § 2014(c) 24

26 U. S. C. § 3304 23

26 U. S. C. § 3304(a)(5) 24

45 U. S. C. § 351 24

45 C. F. R. 233.100 (July 6, 1973) 29

38 Fed. Reg. 49 (January 3, 1973) 29

72 Stat. 997 32

Congressional Authorities

79 Cong. Rec. 9271, 74th Cong., 1st Sess. (June 14, 1935) (Comments of Sen. Harrison) 13

79 Cong. Rec. 8274, 74th Cong. 1st Sess. (May 27, 1935) 25

115 Cong. Rec. 26845-26890 (September 2, 1969) 33

116 Cong. Rec. 42121 (December 17, 1970) 33

116 Cong. Rec. 44-163-44170 (December 30, 1970) ... 33

116 Cong. Rec. 44430-44443 (December 31, 1970) ... 33

Hearings on S. 1130 before the Senate Committee on Finance, 74 Cong., 1st Sess. "Economic Security Act", February 9, 1935, pp. 591-632, pp. 1311, 1328 ..... 26, 30

H. R. Rep. No. 615, 74th Cong., 1st Sess., 8 (1935) 22

H. R. Rep. No. 858, 74th Cong., 1st Sess., (May 9, 1935) p. 8 25

H. R. Rep. No. 91-1402, 91st Cong., 2nd Sess., reprinted in (1970) U. S. CODE CONG. & AD. NEWS 6025 31

S. Rep. No. 628, 74th Cong., 1st Sess., 14 (1935) 13, 22, 23-24

S. Rep. No. 573, 74th Cong., 1st Sess., (1935) 10

Other Sources

Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337, 1352 .....6, 8, 12

Hoar, R., *Wisconsin Unemployment Insurance* (1934).. 32

Hughes, Marsile, Jr., *Principles Underlying Labor Dispute Disqualifications* (Social Security Administration, July, 1946), p. 26 28

Larson and Murray, *"The Development of Unemployment Insurance in the United States,* 8 Vand. L. Rev. 181 (1955) 32

New York State Dept. of Labor, *A History of Unemployment Ins. Legislation in the United States and New York States* (December, 1973) 32

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INTEREST OF THE AMICI CURIAE*

The Dow Chemical Company ("Dow"), the Shell Oil Company ("Shell"), the Hawaiian Telephone Company ("HAWTEL"), Pearl Harbor Federal Credit Union, Edward D. Sultan Company, Ltd., and most members of the Hawaii Employers' Council and the Chamber of Commerce of Hawaii, are "employers" as defined in Section 2(2) of the National Labor Relations Act. 29 U. S. C. § 152(2).[1] The definition of "employer" in the Labor Act was amended in 1976 to include health care institutions as defined in Section 2(14). 29 U. S. C. § 152(14). The members of the Hospital Association of Hawaii, including 16 hospitals and 14 nursing homes, fall within the ambit of that definition. As such, these employers are subject to both the bargaining obligations of the National Labor Relations Act, as amended, 29 U. S. C. §§ 141 *et seq.*, and the unemployment compensation statutes of the various states in which they do business.

The decision of the Court of Appeals below, allowing the states the unrestricted freedom to disburse unemployment compensation benefits to striking employees and to assess the struck employer for those benefits through increased taxes, if affirmed, is of immediate interest to each of these employers. Whether each of the several states have been authorized by Congress to modify the balance of economic power underlying the collective bargaining process will directly impact each of the *Amici*. Further, the variant factual pattern in which the *Amici* have been unwilling

* This brief is being filed with the written consents of all parties. Pursuant to Supreme Court Rule 42(1), these consents are being filed simultaneously under separate cover with the Clerk of the Court.

1. These members ranged in size from large employers, who employ substantial numbers of employees, to small employers, such as the Pearl Harbor Federal Credit Union, who employs only 18 persons.

participants will demonstrate to the Court that the instant case is but one example of a common pattern recurring throughout the Nation.

Dow, for example, is currently engaged in litigation with the State of Michigan and the United Steelworkers of America, AFL-CIO CLC ("Steelworkers") before the United States Court of Appeals for the Sixth Circuit contesting the validity of the disbursement of state unemployment compensation benefits to its striking employees. See, *Dow Chemical Co.* v. *Taylor*, 428 F. Supp. 86 (E. D. Mich. 1977), certified to the Sixth Circuit (E. D. Mich. May 19, 1977) (No. 77-8064). The use of unemployment compensation benefits by the Steelworkers during the Dow strike closely resembles the tactics of the Communications Workers of America, AFL-CIO ("CWA"), in the strike underlying the instant litigation. In 1972 and 1974 the Steelworkers struck manufacturing facilities of Dow located at Bay City and Midland, Michigan. The strikers immediately applied for and, in the substantial majority of situations, received compensation benefits under the Michigan Unemployment Compensation Law, Mich. Comp. Laws Ann. § 421.29(8).[2] This mass utilization of unemployment compensation benefits was not a fortuitous or unplanned development. It was an integral part of the Steelworkers' strike strategy, just as it was an integral component of the CWA's strike tactics in the present case, to utilize unemployment compensation benefits to aid members in withstanding the financial pressures of a strike and optimizing the union's capacity to maintain a strike.

2. Initially the State, as it had historically done, disqualified the employees because their unemployment was due to an active "labor dispute." Subsequently, however, the strikers were permitted to "break" the labor dispute disqualification by earning as little as two dollars from an interim employer. Upon being laid off from their interim job, the striking employees reapplied, and thereafter received full benefits for the statutory 26-week period. At all times during that period, however, they retained their status as Dow's "employees" and had jobs open and available to them which they refused to accept. The State of Michigan disbursed approximately $3,400,000 in the form of unemployment compensation benefits to Dow's striking employees.

Hawaiian Telephone Company, Hawaii Employers' Council and the Chamber of Commerce of Hawaii obtained declaratory and injunctive relief against Hawaii's practice of granting unemployment compensation benefits to employees on strike.[3] See, *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. 275 (D. Hawaii 1975). An appeal from that judgment is now docketed before the United States Court of Appeals for the Ninth Circuit, a Petition for Certiorari Prior to Judgment having been denied on March 29, 1978, 98 S. Ct. 1522. Pearl Harbor Federal Credit Union and Edward D. Sultan Co. Ltd., are likewise involved in pending litigation on this subject, and have obtained preliminary injunctions against the processing of claims for unemployment compensation benefits by the State of Hawaii to strikers against those employers. In *Hawaiian Telephone Co., supra*, upon completion of a trial on the merits, the District Court concluded that it was only recently that Hawaii's policy of aid to strikers became fixed. Hawaii grants benefits only to strikers whose employers maintain their business operations despite the strike. The district court held that this policy had a substantial disruptive impact upon the collective bargaining process between HAWTEL and the unions with which it bargained.

Shell is similarly engaged in litigation contesting the validity of the State of Washington's payment of unemployment compensation benefits to striking employees. *Shell Oil Co.* v. *Brooks*, No. C74-1935 (W. D. Wash.). That case arose out of a 1973 strike at Shell's Anacortes, Washington refinery by employees who were represented by the Oil, Chemical and Atomic Workers International Union ("OCAW"). To maintain Shell's production

3. That action filed in the District Court for the District of Hawaii on June 18, 1974 sought to prevent the processing for payment of claims filed by over 3,000 strikers for unemployment compensation amounting to more than $1,200,000. If paid, such benefits would have been charged against HAWTEL's unemployment insurance reserve account, resulting in the imposition of higher payroll taxes upon HAWTEL to replenish that account. By the same token Dow is faced with a potential tax liability for the $3,400,000 that was disbursed to Dow's striking employees.

during the strike, temporary arrangements, including the use of supervisory personnel and employees assigned from other facilities, were implemented by Shell. Washington, however, like Hawaii, permits unemployment compensation benefits to be paid to strikers where a strike fails to curtail the struck employer's production substantially. Pursuant to that policy, the Shell strikers received unemployment compensation benefits for the duration of the 1973 strike. Again, as in Hawaii and Michigan, the grant of unemployment compensation benefits was the result of carefully orchestrated union efforts which had the effect of requiring Shell to finance the strike through its unemployment compensation tax contributions.

The issue presented in the instant case is, therefore, of vital concern to each of these employers, as well as a substantial segment of American industry. Although each state system differs, the ultimate impact of the payments in each case made during the Shell, Hawaiian Telephone and Dow strikes closely resembles the impact found in the case at bar. Thus, the question before the Court—whether the availability of state unemployment compensation benefits to striking employees intrudes into an area left by Congress to the "free play of economic forces" (*Lodge 76, I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. 132 (1976))—is a question that is of great significance to the *Amici*. It is for this reason that they respectfully submit their views to the Court.

QUESTIONS PRESENTED

1. Whether Congress, in fashioning a comprehensive national labor policy mandating government neutrality in labor disputes and leaving the area of collective bargaining to the free play of economic forces, intended that each of the several states be granted total freedom to subsidize strikers at the expense of their struck employers through the disbursement of unemployment compensation benefits.

2. Whether the federal policy of government neutrality in collective bargaining must give way to state enactments grant-

ing employer-financed unemployment compensation to strikers, regardless of the degree of adverse impact of such benefits on free collective bargaining.

SUMMARY OF THE ARGUMENT

Federally protected or prohibited employee activities, the historic focus of labor preemption cases, have now been recognized to be but one of "two categories" of labor preemption problems. *Lodge 76, I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. 132 (1977). The other "category" is the permissible extent of the states' legislative power to interfere with the Congressionally prescribed balance of economic interests and weapons underlying the federal collective bargaining scheme. The *Amici* will demonstrate herein that the state policy at issue is invalid for two separate and independent reasons. *First*, the state policy at issue is an effort to readjust the bargaining strengths of the parties and is, therefore, an impermissible rejection of the federal ". . . framework for . . ., collective bargaining, and the conduct of labor disputes. . . ." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972). A state may not, as here, reevaluate the special interests of the strikers, employers, or even the public in collective bargaining and/or labor disputes. *Lodge 76, I. A. M.* v. *Wisconsin Employment Rel. Comm., supra.* See also Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1355-56 (1972), cited and applied in *People* v. *Federal Tool & Plastics, Div. of V. C. A.*, 62 Ill. 2d 549, 555, 344 N. E. 2d 1, 4 (1975). *See also, Sears, Roebuck and Co.* v. *San Diego County Dist. Council of Carpenters*, 46 U. S. L. W. 4446, 4450-4451 (May 15, 1978) (No. 76-750). *Second*, wholly apart from the doctrine of labor law preemption, the disputed state policy is also invalid under a traditional Supremacy Clause analysis which requires the courts to determine empirically whether a state policy has a "tendency to frustrate" (*Nash* v. *Florida Industrial Comm.*, 388 U. S. 235, 237 (1967))

or to palpably obstruct (*Grinnell Corporation* v. *Hackett*, 475 F. 2d 449, 457 (1st Cir. 1973), *ITT Lamp Division* v. *Minter*, 435 F. 2d 989, 993 (1st Cir. 1970), *cert. den.* 402 U. S. 933 (1971), *reh. den.* 404 U. S. 874 (1971)) a federal policy or process.

Heretofore, as a result of either or both of these analyses, the states through their unemployment compensation systems have not been permitted to interfere with the exercise of rights under the Labor Act. *Nash* v. *Florida Industrial Comm., supra.* As the National Labor Relations Board stated to this Court as an *amicus curiae* in *Nash* (br., p. 7):

> Within broad limits, [a state] is unquestionably free to prescribe the conditions upon which employees are entitled to receive the benefits of the State's unemployment compensation system. Nevertheless, a "state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" * * * This Court has frequently set aside State regulatory schemes found to impair rights created by the National Labor Relations Act. See *Hill* v. *Florida, supra; Auto Workers* v. *O'Brien*, 339 U. S. 454 (1950); cf. *San Diego Building Trades Council* v. *Garmon*. [359 U. S. 236 (1959)] And the conditions that a State may impose upon a grant of benefits are likewise subject to scrutiny to insure consistency with federal policy. *It is quite clear a State cannot condition the grant of benefits in a manner that undermines rights protected by the Constitution or frustrates federal legislation.* [Emphasis added.]

The decision of the Court of Appeals wholly disregards *Nash* and is predicated on an inaccurate construction of legislative history. Hence, if free collective bargaining is to continue to be a basic tenet of the national labor policy, no state may use its unemployment compensation law to frustrate that process absent a clearly articulated, Congressionally prescribed exception permitting such an obstruction. No such clearly prescribed Congressional exception is present in the instant case.

ARGUMENT

A. Free Collective Bargaining Without Government Interference Is Essential to the Federal Labor Scheme.

The process chosen by Congress to promote economic stability and minimize industrial strife is unfettered collective bargaining. *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, 295 (1959). In *Lodge 76 I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. 132 (1976), the Supreme Court recognized that "Congress struck a balance of protection, prohibition, and *laissez faire* in respect to union organization, collective bargaining and labor disputes. . ." 427 U. S. 140, n. 4, quoting Cox, 85 Harv. L. Rev. at 1352. This congressionally defined balance of interests includes the basic precept that the collective bargaining process "be controlled by the free play of economic forces". *Lodge 76 I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. at 140, 177. Indeed, the use of economic sanctions is at the core of this federal scheme. *Id.* at 144. *N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. 477 (1960); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). "The degree of economic power the parties possess" (*N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. at 489), rather than the "Government . . . control[s] the results of the negotiations." *Id.* at 488. The right to bargain collectively thus clearly contemplates economic warfare, and "does not entail any 'right' to insist on one's position free from economic disadvantage". *American Shipbuilding Co.* v. *N. L. R. B.*, 380 U. S. 300, 309 (1965).

Consistent with these principles, the courts have jealously guarded the process of collective bargaining from state interference. This Court, for example, has heretofore found that for a state "[t]o restrict the objectives for which economic pressure can be applied [see *Local 24, International Brotherhood of Teamsters* v. *Oliver, supra*], or the forms of pressure which are permissible [see *Lodge 76 I. A. M.* v. *Wisconsin Employment*

Rel. Comm., supra; Teamsters, Local 20 v. *Morton*, 337 U. S. 252 (1964)] tips the scale towards management or union," and is prohibited. See Cox, 85 Harv. L. Rev. at 1353. Not even the National Labor Relations Board is permitted to tamper with the free play of the competitive forces underlying the bargaining process. *H. K. Porter* v. *N. L. R. B.*, 397 U. S. 99 (1970). In *Oliver* this Court explained (358 U. S. at 296):

> Since the federal law operates here, in an area [collective bargaining] where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.

Accord, John Hancock Mutual Life Insurance Co. v. *Commissioner of Insurance*, 349 Mass. 390, 398, 208 N. E. 2d 516, 522 (1965);[4] and *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648, 645 (Del. 1967). The controlling principle that must be applied is that where state action may have a coercive effect, whether direct or indirect, upon the process of bargaining between the parties to a labor dispute, it is prohibited by the overriding federal policy of government neutrality. See, *e.g.*, the various cases in which publicity by state boards of conciliation has been held to be an impermissible intrusion upon the federally protected process of free collective bargaining. *General Electric Company* v. *Callahan*, 294 F. 2d 60 (1st Cir. 1961); *Oil, Chemical & Atomic Workers* v. *Arkansas Louisiana Gas Co.*, 332 F. 2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich. 1955).

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4. After a careful analysis in *John Hancock Mutual Life Insurance Co.*, the Supreme Court of Massachusetts recognized the full extent to which Congress has occupied this field. Striking down a statute permitting owners of debit life insurance policies an additional grace period in the event of a strike by an insurance company's collecting agents, the court stated:

> For the state to intrude into such an area [of collective bargaining] designed to be kept free is as much a violation of Federal policy as it is for a state to attempt to regulate rights or duties specifically protected by federal acts. 349 Mass. at 403; 208 N. E. 2d at 525.

B. A State Statute That Predicates the Payment of Unemployment Compensation to Striking Employees Upon Their Status as Strikers Constitutes an Impermissible Reevaluation of the Balance Between Labor and Management Under the Federal Labor Scheme.

The New York policy is an impermissible special accommodation which has the object and effect of assisting one side in a labor dispute after eight weeks of State neutrality. Normally, an individual who repeatedly refuses to work at his own job is denied unemployment compensation benefits; conversely, other persons in the same circumstances, but engaged in a concerted refusal to work for eight weeks, are entitled under New York law to receive such benefits.[5] The situation of New York Telephone's ("TELCO") striking employees is not unlike that of an employee who has taken a voluntary leave of absence: both are still employees; both are withholding their services for voluntary reasons; and both have their own jobs open and available to them.[6] Striking employees will, however, at the conclusion of an eight-week waiting period be able to

5. See, § 592.1, New York Labor Law, (McKinney 1977).

6. The federal labor laws protects the jobs of striking employees who have not been replaced. See, e.g., *N. L. R. B.* v. *Fleetwood Trailer Co.*, 389 U. S. 375 (1967). The Board and the courts have repeatedly recognized that by becoming a striker a worker does not become unemployed. This principle is rooted in the original Wagner Act's legislative history:

> The term 'employee' also includes any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, who has not attained any other regular or substantially equivalent employment. The bill thus observes the principle that men do not lose their right only to be considered as employees for the purposes of this bill merely by collectively refraining from work during the course of a labor controversy . . . To hold otherwise for the purposes of this bill would be to withdraw the Government from the field at the very point where the process of collective bargaining has reached a critical stage and where the general public interest has mounted to its highest point. Senate Report No. 573 on S. 1958, pp. 6-7, at II Legislative History of the National Labor Relations Act 2306 (1935).

obtain benefits under the New York statute, while the other employees will be denied those benefits. By the same token in Michigan, a specific statutory provision precludes the payment of benefits to persons who are unemployed as a result of a voluntary leave of absence from their jobs (Mich. Comp. Laws Ann. § 421.29), but a striker in the same circumstances is eligible to receive benefits. Thus, under both the New York and Michigan policies, the strking employees receive benefits while other similarly situated employees do not. The receipt of those benefits results solely from an employee's status as a striker, rather than a neutral factor such as economic need (see, *Lodge 76, I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. at 155) (Powell, J. concurring)). This preferential treatment for striking employees is, as a matter of law, impermissible under the doctrine of labor law preemption. No further factual demonstration is necessary. See, *e.g.*, *Local 24, International Brotherhood of Teamsters* v. *Oliver, supra* and *Teamsters, Local 20* v. *Morton, supra.*

The decision of the Court of Appeals, which condones such a special accommodation, would logically permit even more flagrant intrusions into the federal labor scheme. Each state would presumably be wholly free to strike its own balance of economic interests without regard to its impact upon the federal labor scheme. Such abuses are exemplified by the "stoppage of work" test utilized by Washington and Hawaii to determine the eligibility of a striking employee to receive benefits.[7] That test, succinctly stated, is that a striker is disqualified from receiving benefits unless his employer successfully exercises his federal right to maintain its operations and hence avoid a "stoppage of work". This qualification mechanism strikes at the very core of an employer's right under the federal labor scheme. The goal of an employer in a strike situation is to maintain, to the greatest degree possible, his business operation during a strike and thus

7. See, Haw. Rev. Stat. Ch. 383-30(4); Wash. Rev. Code § 50.20.090.

enhance his economic position at the collective bargaining table. That effort by the employer constitutes the most basic form of self-help. "This weapon of self-help, permitted by federal law, form[s] an integral part of the [employer's] effort to achieve its bargaining goals during negotiations with [unions]. Allowing its use is a part of the balance struck by Congress between conflicting interests of the union, the employees, the employer and the community." *Teamsters, Local 20* v. *Morton*, 377 U. S. at 259. The "stoppage of work" test operates to counter-balance the economic position of the parties where the employer has elected to maintain his business operations.

It is nothing more than an effort to balance bargaining positions by withholding benefits from striking employees when the employer's position is weak and dispensing benefits when the employer is in a strong bargaining position. Such an "attempt to 'introduce some standard of properly balanced bargaining power'" (*Lodge 76 I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. at 149-150) by any state "stands as an obstacle . . . to the objective of Congress" (*Id.* at 151) and is impermissible; ". . . the likelihood that its application to persons under N. L. R. B. jurisdiction will upset the balance of interests struck by Congress is so great as to require exclusion of state law unless Congress has provided otherwise." Cox, 85 Harv. L. Rev. at 1356. The Court of Appeals decision would, however, legitimize such policies.

Each of the states' statutes examined above, regardless of the method utilized to readjust the bargaining positions of the parties, further penalizes the employers involved directly by raising their tax rates in order to provide the benefits to the strikers. This increase in the tax rate of the employer occurs in all states where the relevant statute or subsequent judicial interpretations permit payment by the state of unemployment compensation benefits to striking employees. These taxing schemes act as direct conduits to move funds from the employer to the strikers. The National Labor Relations Board, however, has stated that during a strike

an employer may not be required "to subsidize the strike." See, *e.g.*, *Southwestern Electric Power Co.*, 216 N. L. R. B. 522 (February 14, 1974). A state surely cannot be permitted to require what the Board has prohibited. Compare *Nash* v. *Florida Industrial Comm.*, *supra*. After all, the parties to a federal labor dispute possess certain rights which inherently conflict: the right to strike, and the right to resist a strike. An adjustment of an employer's unemployment compensation taxes to provide a "real cash incentive" to "stabilize employment"[10] is, in a strike context a direct deterrent to employers from exercising their federal right to reject a union's economic terms and attempt to stay in business. "It appears obvious that this financial burden which [a state] imposes will impede" the exercise of an employer's federal right under the Labor Act. *Nash* v. *Florida Indus. Comm.*, 389 U. S. at 239. "A National system for the implementation of the country's labor policies is not so dependent on state law." *Ibid.*

C. The Disbursement of Unemployment Compensation Benefits in Fact Obstructs the Collective Bargaining Process.

The factual record in the instant case demonstrates the pervasive impact of the New York policy on the federal collective bargaining process. As was noted by the court in *Grinnell Corp.* v. *Hackett*, 475 F. 2d 449, 457-458 (1st Cir. 1973):

> The relevant question then in determining this statute's impact upon the federal collective bargaining policy is whether the receipt or expectation of receipt of unemploy-

10. The purpose of the experience rating system, which varies employer's tax rates directly with the amount of benefits paid to his employees or former employees, is to provide a "stabilization incentive to employers . . . [I]f employers are given a real cash incentive to stabilize and regulate their employment they will be able" to minimize unemployment. 79 Cong. Rec. 9271, 74th Cong., 1st Sess. (June 14, 1935) (Comments of Sen. Harrison). See also Sen. Rep. No. 628, 74th Cong. 1st Sess. (May 13, 1935), p. 14. Here, by the same process, the incentive inherently discourages employers from resisting union demands.

> ment compensation benefits after [eight] weeks of a strike causes workers to stiffen bargaining demands beyond those they would have made without such benefits, to strike in the first instance when they would otherwise have settled, or to continue a strike for a longer period than they otherwise would.

Upon careful consideration of the factual record now before this Court, the District Court made the specific finding that "unemployment compensation *does* have an impact on strikes." *New York Telephone Co.* v. *New York State Department of Labor,* 434 F. Supp. 810, 819 (S. D. N. Y. 1977). [emphasis added.][11] Even a cursory review of the record demonstrates the propriety of that conclusion.

The factual record demonstrates that the expectation of the New York members of the CWA, that unemployment compensation benefits would be disbursed after eight weeks,[12] did cause them to stiffen their local demands beyond those that would have been made had there been no such benefits, and further, that they did continue to strike for a longer period than they otherwise would have occurred. *New York Telephone Co.* v. *New York State Department of Labor,* 434 F. Supp. at 813-814. After a nationwide agreement was reached on July 18, 1971, between the Petitioners and the CWA, roughly 38,000 CWA members employed by the Petitioners remained on strike in New York.

11. The Court of Appeals implicitly accepted the factual determinations made by the District Court, but concluded that "the conflict between New York's statute and the broad federal policy of free collective bargaining does not render the state statute unconstitutional." *New York Telephone Co.* v. *New York State Department of Labor,* 566 F. 2d 388, 395 (2d Cir. 1977). The *Amici* submit that that conclusion is incorrect since the Second Circuit reversed the burden of proof improperly. Where, as here, the record factually establishes the actual obstruction of a federal statute, the burden is on the state to demonstrate that such an obstruction has been authorized. Such an authorization, however, does not exist. See p. 21, *infra.*

12. The New York statute provides for the payment of unemployment compensation benefits to striking employees, regardless of a showing of need, after the conclusion of an eight week waiting period. N. Y. Labor Law §§ 590.9, 592.1 (McKinney 1977).

During the first week of September, 1971, strikers became eligible for weekly unemployment compensation, which under the law in effect in 1971-1972, amounted to a maximum of $75.00. During the course of that strike, some $49,000,000 in unemployment benefits were disbursed to the striking employees. The significance of those payments was acknowledged by the Union leadership, and thus, as was concluded by the District Court, the receipt of benefits was "a substantial factor affecting [the strikers] willingness to go on strike, or once on strike, to remain on strike." *New York Telephone Co.* v. *New York State Department of Labor,* 434 F. Supp. 814-816.

Union reliance on state subsidies to sustain striking members is not limited to Petitioners' employees, the CWA or to the State of New York. A similar pattern recurs nationally.

1. The facts revealed in discovery during the proceedings in *Dow Chemical Co.* v. *Taylor,* 428 F. Supp. 86 (E. D. Mich. 1977), appeal pend. (6th Cir.) (No. 77-8064) exemplify the problem. In 1972 and 1974 two different local affiliates of the United Steelworkers of America ("Steelworkers") struck the manufacturing facilities of Dow located in Bay City and Midland, Michigan, respectively. The State of Michigan disbursed approximately $3,400,000 in the form of unemployment compensation benefits to Dow's striking employees. As stated in the verified complaint on the average, the benefits disbursed to each recipient approximated almost 50 percent of each worker's net compensation after tax deductions. This utilization of benefits was not fortuitous or unplanned but was, in fact, a part of the Steelworkers' comprehensive strike and defense program used by its local affiliates, in conjunction with allotments from the International Strike and Defense Fund, to aid local members in withstanding the financial pressure of a strike situation.

The importance that the Steelworkers' local unions placed on the availability of unemployment compensation benefits is dem-

onstrated by their actions during the course of the two Dow strikes. Officials of both locals directed the membership to file claims even though the Michigan statute on its face prohibited the payment of those claims.[13] In an April 1, 1974 newsletter, for example, it was stated that "[e]veryone should file for unemployment benefits even if they have not found [an interim] job." Additionally, both Steelworker locals informed their members that should any member's claim be denied, the local unions would provide legal counsel to appeal that denial, the Bay City union ran an ad in the newspaper to aid its union members in getting interim jobs to break the strike disqualification, and the officers of the union met with the Michigan Employment Security Commission officials to enhance the probability that Dow's striking employee would encounter no obstacles when applying for benefits.

The fact that the state of Michigan's unemployment compensation benefits were the primary economic resource relied on by the Steelworkers, is best illustrated by a simple comparison. The 1974 strike was commenced in March, 1974, and settled approximately twenty-six weeks later in September when the stream of state unemployment compensation benefits was due to decline. During that period the strikers received over $3,000,000 from the State whereas *all* other sources, including

13. That statute provided, *inter alia*, that "an individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress . . ." See Mich. Comp. Laws Ann. § 421.29(8). However, in 1968 the Michigan Supreme Court held that the statutory labor dispute exemption did not apply to strikers who had obtained "interim employment" after the commencement of a strike. *Great Lakes Steel Corporation* v. *Employment Security Commission*, 281 Mich. 249, 161 N. W. 2d 14. The effect of that decision is demonstrated by the 1972 and 1974 Dow strikes in which the state initially, as it had historically done, disqualified the employees because their unemployment was due to an active "labor dispute." Subsequently, however, the strikers were permitted to "break" the labor dispute disqualification by earning as little as two dollars from an interim employer. Upon being laid off from the interim job, the striking employees reapplied, and thereafter received full benefits for the statutory 26-week period.

the Steelworkers' strike fund, only provided $2,148,003.26 to the Midland local union. Of these latter moneys none was distributed directly to the strikers and only $96,331.86 was distributed to the creditors of the strikers. The maintenance of the economic position of the individual strikers was, accordingly, the task of Dow, as coerced by the State of Michigan.

2. The factors surrounding the Shell strike at its Anacortes, Washington, refinery further bear out the substantial impact on collective bargaining that flows from the payment of unemployment compensation benefits to striking employees. As a result of a breakdown in collective bargaining negotiations between Shell and the Oil, Chemical, and Atomic Workers ("OCAW"), the latter called a strike and established a picket line at Shell's Anacortes premises at noon on January 24, 1973, resulting in a walkout by the 220 employee-members of OCAW. The strike continued and the picket lines were maintained until June 1, 1973, when, following the consummation of a collective bargaining agreement, the strike ended and all of the striking employees resumed work. During the strike temporary arrangements, including the use of supervisory personnel were implemented by Shell, as permitted by federal law, in an effort to maintain production at its Anacortes refinery. The State, however, follows, as noted above, a policy of granting unemployment compensation benefits to striking employees, notwithstanding that they have work open and available to them, when the employer manages to maintain production, i.e., avoids a "stoppage of work."[14] Accordingly, solely due to Shell's effort to maintain its business operation, the State paid full unemployment compensation benefits to Shell's striking employees. As in the Dow strikes by the Steelworkers, the strikers' applications for the disputed benefits were not fortuitous, but in accord with guidelines set forth in the OCAW strike manual. In addition, in anticipation of the strike, OCAW finance, welfare and employment commit-

14. See, Wash. Rev. Code § 50.20.090; *Shell Oil Co.* v. *Brooks*, 88 Wash. 2d 909, 567 P. 2d 1132 (1977).

tees were formed at Shell, *inter alia*, to handle the collection and distribution of money to strikers, and to assist strikers in obtaining benefits from public and private agencies. These facts, as in the instant case, bear out the substantial impact that the payment of unemployment compensation benefits has on the bargaining process.

3. The evidence adduced by HAWTEL in its action provides details as to how actual bargaining positions are altered. In early 1974, an award of $100,000 in unemployment compensation benefits to striking employees of the Hawaiian Electric Company was announced and publicized. According to the testimony of Donald Kuyper, Vice-President of HAWTEL, after reading of this decision in the newspapers, he immediately recognized the importance of the availability of such benefits in the upcoming HAWTEL negotiations, and the impact of the resulting increased taxes on HAWTEL's bargaining position. *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor & Indus. Rel.*, 405 F. Supp. 276, 279 (D Hawaii 1975). He discussed this development with his Executive Committee and consulted the Vice-President for Industrial Relations of the Hawaiian Electric Company about the decision, who told him how the "work stoppage test" had been applied. As the HAWTEL bargaining negotiations approached the strike deadline of April 30, 1974, Kuyper considered several factors to be of major significance: (1) the recent award of unemployment compensation to strikers, (2) the past period of layoffs and the employees' concern for job security; (3) the rising cost of living; and (4) the removal of governmental controls on wages.

Prior to the announcement of the receipt of unemployment benefits by the Hawaiian Electric strikers, HAWTEL had budgeted for an anticipated eight percent (8%) total wage and benefit increase. By May 6, 1974, however, HAWTEL had offered, and the union negotiating committee had submitted to the membership for acceptance or rejection, an offer for a two-year contract with a nine percent (9%) wage increase during

the first year, and eight percent (8%) during the second. This additional 1% increase during the first year in its offer was $320,000 above HAWTEL's original cost plan. When this offer, submitted by the union negotiating committee to the membership, was voted down, a strike commenced on May 7, 1974. Mr. Kuyper explained that one of the reasons he increased his original as well as his final offer to the Union was the knowledge that unemployment compensation gave the Union the ability to go and stay out on strike.

The availability of those benefits was similarly a pervasive factor in the International Brotherhood of Electrical Workers, Local 1357's ("IBEW") bargaining position. The IBEW officer, Mr. Victor, testified that inquiries were made by his members "to tell [the union leadership] to get the information [with regard to the availability of unemployment compensation benefits] before [a strike vote] so that [the employees] would know whether they should make up their mind to strike or not. . . ." *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. at 281. After the strike started, striker inquiries as to the availability of unemployment compensation inundated the IBEW strike headquarters. Virtually all the striking employees applied for unemployment compensation benefits as a result of the following factors: an extensive Union campaign; pre-strike arrangements with the State unemployment compensation agency; the use of Local 1357 representatives to obtain the signatures of the striking applicants on special mass sign-up sheets provided by the State; and common representation of the striking applicants by Union business agents and lawyers before the State unemployment compensation agency. Even more telling was the admission by the IBEW, in conjunction with the Hawaii AFL-CIO and the other major Hawaii unions, that victory for HAWTEL in *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, *supra*, would, as stated in their published leaflets, materially affect *"strikers' right and ability to strike"* and indeed "cripple

. . . strikes in the future," *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. at 281-282. [emphasis added.] These admissions were part of a public union effort, including rallies and "mass picketing," to "defend the right to strike" during the proceedings before the district court in *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*

The District Court in *Hawaiian Telephone*, after completion of a trial on the merits, concluded that the availability of unemployment compensation benefits to the strikers at HAWTEL's expense, had a clear impact on both the employees and the employer. *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.*, 405 F. Supp. at 282. It noted that the expert witness, who testified for the Hawaii AFL-CIO and the other defendant unions,

> . . . Mr. Ruttenberg, conceded that (1) the existence of a strike fund may be a significant factor in the results of collective bargaining; (2) the existence of a large available source of funds during a strike is used by unions to impress employers that the union has the resources to back up a threat to strike; and (3) the loss of income to strikers is a factor in the minds of strikers when deciding whether to accept an employer's collective bargaining offer. 405 F. Supp. at 280. [footnote omitted.]

As is apparent from the foregoing, the factual pattern before this Court is not a single, isolated incident in the State of New York, but is instead part and parcel of a nationwide effort by unions to utilize unemployment compensation benefits to finance their strike efforts. That pattern, as summarized above, bears out the assertion that the availability of such benefits does in fact have a devastating and impermissable impact on the positions of the parties to collective bargaining negotiations.

D. The States Have Not Been Authorized to Modify the Balance of Interests Struck by Congress.

Notwithstanding whether the disputed New York policy (1) is viewed as a "palpable infringement" on the collective bargaining process (*Grinnell Corporation* v. *Hackett*, 475 F. 2d at 457), or (2) is determined to constitute a prohibited "special accommodation" (*Lodge 76, I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. at 156), the burden is properly on the State to demonstrate that the obstructive policy has been authorized by Congress. As this Court has concluded in the past, federal labor policy is presumed to insulate the mechanics and dynamics of the collective bargaining process from adjustments by the states. See pp. 8-9 *supra*. Accordingly, the requisite Congressional authorization should not be lightly inferred. See pp. 28-33, *infra*. The Court of Appeals' contention on this issue, that legislative history indicates such approval was at odds with the decision of every other court that had addressed the question.[16] As the United States Court of Appeals for the First Circuit concluded:

> [T]he existing legislative record is not sufficiently clear to establish congressional intent either way . . . . The most that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances . . . . [U]nambiguous Congressional intent is lacking.

As was found by the First Circuit, the requisite clear congressional approval is lacking. If any inferences may be drawn from the legislative history, they are that (a) Congress, in the National Labor Relations Act intended to strike a balance among the

16. See, e.g., *Grinnell Corp.* v. *Hackett, supra, Hawaiian Telephone Co.* v. *Hawaii Dept. of Labor and Indus. Rel., supra; Dow Chemical Co.* v. *Taylor*, 57 F. R. D. 105 (E. D. Mich. 1972) *interloc. appeal pend.* (6th Cir.); *American Broadcasting Cos.* v. *New York State Dept. of Labor*, 77 Civ. 2995 (S. D. N. Y. June 30, 1977). *Cf. Owlin* v. *Illinois Dept. of Labor*, 443 F. Supp. 366 (S. D. Ill. Jan. 1978)—which followed the decision of the Court of Appeals for the Second Circuit.

respective interests of the parties in collective bargaining (see *Lodge 76 I. A. M.* v. *Wisconsin Employment Rel. Comm.*, 427 U. S. at 146), (b) Congress never intended that the states would grant unemployment compensation to strikers, and (c) where Congress intended to assist strikers financially, it has expressly done so.

1. The New York Statutes Fall Within the Ambit of the Supremacy Clause

In 1935, Congress was drawn reluctantly into the unemployment compensation field. Earlier, the states had been unable to take the initiative in that area, "due largely to the fact that to do so would handicap their industries in competition with the industries of other States." H. Rep. No. 615, 74th Cong., 1st Sess. (April 5, 1935), p. 8. Accordingly, Congress did not "set up a federal unemployment compensation system . . . [but] merely [made] it possible for the states to [do so] (Sen. Rep. No. 628, 74th Cong. 1st Sess. (May 13, 1935), p. 12) by assessing a uniform nationwide tax upon employers against which employer payments to state unemployment compensation plans would be credited. Since the same tax would be paid by employers without regard to the existence of a state program, the "principal obstacle" (H. Rep. No. 615, p. 8) to state action was removed, and the possibility of retaining tax funds within a state provided an incentive to create state plans. Otherwise, "[e]xcept for a few standards . . . the states [were] left free to set up any unemployment compensation system they wish, without dictation from Washington" (Sen. Rep. No. 628, p. 13) *as long as* their actions did not derogate from other federal legislation. See *Nash* v. *Florida Industrial Commission, supra,* and *Grinnell Corporation* v. *Hackett, supra.*

The conclusion of the court below, that Congress intended to permit the states unbridled freedom to dispense unemployment compensation without regard of the impact of the states' practices on the federal labor scheme or other federal statutes, dis-

regards this Court's pronouncement in *Nash* and is predicated on an inaccurate construction of the legislative history.[17] The federal unemployment compensation tax law only enumerates certain minimal requirements that are reviewed and certified to have been satisfied by the Secretary of Labor. The Secretary, and his predecessor, the Social Security Board, have always had to "approve any state law submitted to [them]" (26 U. S. C. § 3304) which met these requirements and have not been permitted to exercise any discretion or administrative expertise. Hence, as demonstrated in *Nash* v. *Florida Industrial Commission, supra,* apart from the express requirements of the statute, the Supremacy Clause applies fully to all other provisions or applications of a state plan.

2. Congress Never Intended That the States Would Compensate Strikers

Congress did not anticipate even the possibility that unemployment compensation programs would be extended to strikers. The state plans were only intended to create "reserves during periods of employment from which compensation [would be] paid to workmen who *lose their positions when employment slackens* and who cannot find other work . . . Payment of compensation is conditioned upon continued *involuntary unemploy-*

17. The Court of Appeals relied upon references in the legislative history of the Social Security Act with regard to the desire of Congress to permit experimentation by the States. What the court failed to appreciate was that the subject of that history was not the payment of unemployment compensation benefits. The primary thrust of the legislative history dealt not with eligibility standards, but with alternative methods of creating a constitutional *financing* and *funding* system. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936) and *Schecter Poultry* v. *U. S.*, 295 U. S. 495 (1935). References within the congressional reports to the range of possibilities that the States could adopt referred to allowing the states the choice between "pool funds" or "individual employer accounts." Witte, *The Development of the Social Security Act* (U. of Wis. Press, 1963), pp. 141-145. The issue on the minds of Congress was the constitutional implication of this new venture—not the creation of an exception to the preemptive impact of the then only recently-enacted National Labor Relations Act.

ment." Sen. Rep. No. 628, p. 11. [Emphasis added.] The underlying assumption was that a worker would take available work; nowhere in the legislative history is there any indication that a striker was exempted from that intent.

Congress did protect uninvolved third parties from being forced by a state to become strikebreakers, but did not extend that protection to strikers themselves.[18] Instead Congress, while simultaneously drafting the Labor Act, defined a striker to be an "employee." See p. 10, n. 6, *supra,* and p. 30, n. 30 *infra.* Moreover, when Congress has intended to readjust the economic bargaining position of parties under the Labor Act, it has done so expressly.[19] And with regard to unemployment compensation

18. Congress set forth three standards regarding available new work (Sec. 903(a)(5) of Public Law No. 271 (1935); 26 U. S. C. § 3304(a)(5);

> Compensation shall not be denied . . . to any otherwise eligible individual for refusing to accept *new work* under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization; [Emphasis added.]

If, in fact, Congress wished to include strikers, it could have readily deleted the modifier "new" (work) as it did elsewhere. In the Food Stamp Act (Public Law 91-671, 84 Stat. 2048 (1971)), for example, it was expressly provided that it is not a refusal to accept employment to refuse to work ". . . at a plant or site subject to a strike or lockout . . ." 7 U. S. C. § 2014(c). See also n. 19, *infra.*

19. Congress has acted in two areas to accommodate federal labor policy to other objectives. First, in situations of total economic deprivation Congress expressly provided for the disbursement of food stamps (see n. 18, *supra*), and, by way of administrative regulation, welfare benefits. *Francis* v. *Davidson,* 340 F. Supp. 351, *sum. aff'd.* 409 U. S. 904 (1972).

In far different circumstances, in order to encourage use of an arbitration system thereby preventing costly railway work stoppages, Congress granted unemployment benefits to striking railway employees who exhausted the arbitration system. Otherwise, no benefits are paid. 45 U. S. C. § 351; *Brotherhood of Ry. and S. S. Clerks,*

(Footnote continued on next page.)

in the *only* situation where Congress acted directly at the local level, in the District of Columbia, strikers have always been excluded[20] under a provision, passed simultaneously with the Social Security Act of 1935 putting "into effect the provisions of the social security bill in regard to unemployment compensation for the District of Columbia," that was intended to "serve as a model to the States, to guide them in the enactment of sound unemployment compensation legislation." H. Rep. No. 858, 74th Cong., 1st Sess. (May 9, 1935), p. 8. As the "beacon light" for the states, Congress provided that an applicant ". . . must not be engaged in a strike. . . ."[21]

An examination of the "draft state bills" with which Congress worked prior to passage of the Social Security Act in 1935, and which were distributed by the Social Security Board after passage in 1936, rebuts any contention that Congress intended to authorize a state intrusion into the scheme of the National Labor Relations Act which, at that time, had not even been implemented. On June 8, 1934, President Roosevelt created the

(Footnote continued from preceding page.)

Freight Handlers, Exp. and Station Employees Union v. *Railroad Retirement Board,* 239 F. 2d 37 (D. C. Cir. 1956). The system, in short, is a compromise necessitated by the paralyzing effect of even short railway strikes and the need to promote the use of the arbitration system with economic incentives. Congress' use of such benefits as an incentive demonstrates that Congress recognizes the role such benefits play in a strike. In general, however, Congress has found no reason which over-balances the beneficial effects of free collective bargaining and has provided no other exceptions to permit government intrusion.

20. Currently the law in the District of Columbia provides (D. C. C. § 46-310(f):

> An individual shall not be eligible for benefits with respect to . . . [unemployment] as a result of a labor dispute still in active progress . . .

Since 1935, the law in the District of Columbia, although amended, has always excluded strikers. Public Law 386, 49 Stat. 946 (Aug. 28, 1935); Public Law 65, 57 Stat. 100 (June 4, 1943); and Public Law 721, 78 Stat. 988 (August 31, 1954).

21. 79 Cong. Rec. 8274, 8276, 74th Cong. 1st Sess. (May 27, 1935)—comments of bill manager, Ellenbogen, R.

Committee on Economic Security. In February, 1935, E. E. Witte, the Committee's executive director, presented to Congress the basic outline for what was to become the Social Security Act of 1935, which included the proposed unemployment compensation system. Concomitantly, the Committee submitted to Congress "draft" bills for state plans, each of which provided that:

> An employee shall not be eligible for benefits for any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was last employed.[22]

The District of Columbia law, as noted above, originated from this model. It was with these "draft bills," that Congress worked while drafting the social security bill in 1935.

A year after the Social Security Act became law, in September, 1936, the Social Security Board issued a "draft bill" which rejected the "labor dispute in active progress" language and began suggesting instead, different language, *i.e.*, "stoppage of work"[23] adopted from the British system, be used by the states. This changeover from the "labor dispute in active progress" to the "stoppage of work" language, however, was not based on any intent to alter the substance of the original proposal. The former clause was "not recommended because 'a dispute in active progress' is very difficult of precise determination."[24] This administrative desire to ease the job of bureaucrats was not followed by Congress, however, when it amended the District of Columbia law in 1943 and 1954.

The "stoppage of work" language, as then understood, would have precluded the TELCO strikers from receiving benefits.

22. Hearings on the Economic Security Act before the U. S. Senate Committee on Finance, 74th Cong., 1st Sess. (February 9, 1935), pp. 591-632, 601, 621.

23. See *Hawaiian Telephone Co.* v. *State of Hawaii Dept. of Labor and Indus. Rel.* 425 F. Supp. at 287.

24. *Unemployment Insurance Legislative Policy Recommendations for State Legislation 1962*, U. S. Dept. of Labor, Bureau of Employment Security; and see the prior editions.

The "stoppage of work" language was adopted from the British statute which had been construed for twenty years and had become a term of art with a concrete meaning. In recognition of that history and to assist the states in applying that language, the Social Security Board distributed, as part of its interpretation service, the text of selected British decisions in June 1, 1938.[25] The principle which emerges from those precedents is that the "stoppage of work" exclusion precluded the payment of benefits to striking employees until their employer either *permanently* replaced them or made other permanent adjustments in the production method so that no job vacancies existed for the strikers to fill.[26] As one authority, distributed to the states by the Social Security Board, stated:

> From the above analysis, it is apparent that the British authorities in determining whether a stoppage of work existed looked first to see whether any job vacancies were created by the dispute. The implication of the statements in the Analytic Guide is that if such vacancies were created and continued to exist for any appreciable length of time,

25. *Unemployment Compensation Interpretation Service.* "Benefit Decisions of the British Umpires; a codification and Text of Selected Decisions (Social Security Board, June 1, 1938).

26. Benefit Decisions of British Umpires, *op. cit.*, p. 597 (British Umpire Case 496—Case Nos. 2575 and 2576):

> "It was difficult to get any clear measure of the effect of the dispute on output, but representatives of the employers intimated that, speaking generally, all orders were being completed at the proper time . . . [T]he employers had rearranged the work and were able to cope with all the work which required to be carried out.
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> * * * * *
>
> Decision: The Court of Referees find . . . it was possible for the management to maintain substantially the same output after the dispute as before, but having some of the men working longer than they had previously been working. The position appears to be, however, that the applicants' places were not filled, in the sense that their services were no longer required. *They continued to be in the position that there was work which they would be doing but for the dispute, and in my judgment that must be held to constitute a stoppage of work which was due to a trade dispute.*" [Emphasis added.]

> there was a stoppage of work . . . Under the British interpretation of the work "stoppage" the individual is disqualified for benefits if his unemployment is due to a trade dispute so long as the job which he held continues to be vacant. It would be necessary for the claimant to show that the job vacancy had been filled in some way in order to effect a termination of his disqualification.[27]

In short, strikers were afforded benefits only when they were *permanently* displaced and would, therefore, have been without employment regardless of the existence of a labor dispute. The TELCO strikers were not so displaced. As individuals unemployed, who had work available to them, who remained part of the work force and who anticipated returning to their struck jobs, they were not meant to obtain unemployment compensation benefits. As this Court has stated:

> ". . . providing for 'security during the period following unemployment' was thought to be a means of assisting a worker to find substantially equivalent employment. . . . It is essential that they be permitted to look for a *job. They should not be doing anything else but looking for a job." Calif. Dept. of Human Resources Development* v. *Java,* 402 U. S. 121, 132 (1971). (Footnotes omitted and emphasis added.)

The striking employees here had jobs; they were not looking for other work. The denial of benefits to such persons, in addition to eliminating an intrusion into the labor scheme, conforms with the intent of the Social Security Act. See pp. 23-25, *supra.* The contrary construction of the Court of Appeals derogates from rather than harmonizes both statutes.

3. The Court of Appeals' Misconstrued the Legislative History.

The expressions of Congressional intent relied on by the Court of Appeals can be separated into general categories:

27. See attachments to Unemployment Compensation Program Letter No. 000 which was separately published as: Hughes, Marsile, J., *Principles Underlying Labor Dispute Disqualification* (Social Security Administration, July 1946), p. 26.

(a) that Congress has permitted other public subsidies to strikers; (b) that Congress granted the states total freedom under the Social Security Act without regard to other federal laws; and (c) that the silent death of a number of Congressional bills in this area constitutes controlling legislative history.

a. The *Amici* recognized that in certain narrow circumstances Congress has modified the collective bargaining scheme by granting certain welfare benefits,[28] or food stamps based, in contrast to the disputed benefits in the instant case, *on need,* and has also used unemployment compensation benefits as an incentive to follow the "interminable process" (*Detroit & Toledo Shoreline Rail Co.* v. *United Transportation Union,* 396 U. S. 142, 149) of exhausting the tedious administrative remedies of "cooling off" procedures under the Railway Labor Act. See pp. 24-25, n. 19, *supra,* and *Brotherhood of Ry. and S. S. Clerks, Freight Handlers, Exp. and Station Employees Union* v. *Railroad Retirement Board, supra.* Those modifications of the national labor scheme are, of course, the choice of Congress. Where, however, Congress has made no such choice, as is the situation here, the states may not, without Congressional authorization, individually modify the national scheme.

b. The Court of Appeals inferred that, since "neither the Social Security Act nor the Federal Unemployment Tax Act [were] intended to restrict the States' freedom to legislate" in the disputed area (*Ohio Bureau of Employment Services* v. *Hodory,* 431 U. S. 471 (1977)), it should also be assumed that the National Labor Relations Act does not restrict state action. *First,* such a construction of *Hodory* would nullify the fact that

28. In *Francis* v. *Davidson,* 340 F. Supp. 351 (Md. 1972) *aff'd,* 409 U. S. 904 (1972) a district court held that federal welfare regulations required the distribution of welfare benefits to the *needy* even if they were striking employees. Subsequently, the federal regulations were amended to specify expressly that the states had the option of setting their own policy with regard to strikers. See 38 Fed. Reg. 49 (January 3, 1973) and 45 C. F. R. 233.100 (July 6, 1973) and *Batterton* v. *Francis,* 432 U. S. 416 (1977). Here no similar express grant of the decisional power to the states in this area exists.

this Court therein expressly declined to consider the preemptive effect of the federal labor scheme upon state policies permitting the payment of benefits to strikers. 431 U. S. at 475 n. 3. *Second,* the Court of Appeals' reliance on the prohibition contained in the Social Security Act forbidding the denial of benefits to persons who refuse to accept "new" work "vacant due to a labor dispute" is misplaced. See p. 24, n. 18, *supra.* This restriction was necessary to preserve, not defeat, state neutrality by precluding the states from requiring strangers to a labor dispute who are by definition not "workers involuntarily unemployed"[29] to work as strike breakers. The overriding policy of government neutrality contained in the Labor Act, however, was not otherwise threatened by the history of Social Security Act.[30] The assumption that an applicant for benefits be available for work, the definition of a current employee contained in the Labor Act (see p. 10, n. 6, *supra*), and the preemptive impact of the Labor Act provided and still provide a clear barrier to providing benefits to striking employees who were refusing to work at their jobs.

29. Report of the Committee on Economic Security, as reprinted in hearings on S. 1130 before the Committee on Finance of the United States Senate, 74th Cong., 1st Sess. 1311, 1328 (1935).

30. This principle of governmental neutrality, although prohibiting subsidies in the instant case, applies equally well to employers. A state could not aid an employer during a labor dispute by subsidy or by requiring an unemployed individual to take work at a struck plant. The California Supreme Court in *Matson Terminals Inc.* v. *California Employment Commission,* 24 Cal. 2d 695, 707 (1944), stated the principle well in construing the California unemployment compensation law:

> The Act establishes a policy of neutrality in trade disputes by provisions that the payment or withholding of benefits should not be used to aid either party to a trade dispute. Thus, the provision disqualifying a worker who leaves his work because of a trade dispute § 56(a), is balanced by the provisions that *other unemployed workers* shall not be required to fill the vacated jobs or lose their right to unemployment insurance benefits. (§ 13(b)(1)). The payment of benefits to a claimant who leaves his work because of a trade dispute would conflict with this policy just as would the withholding of payments because a claimant refused to become a strike breaker. (Emphasis supplied.)

Finally, the fact that the availability-to-work requirement would normally be assumed to exclude striking employees is underscored by the history of the Food Stamp Act. Prior to 1971, food stamps were distributed to all needy persons even if they refused available work. Accordingly, strikers while not automatically eligible, could, like other persons, receive food stamps if they met cetrain need requirements. See Exhibit A hereto, a publicly available letter, dated May 24, 1968, from the Deputy Director Food Stamp Division, Dept. of Agriculture. In 1971, however, Congress required, for the first time, that, "as a condition precedent to obtaining stamps," able-bodied adults accept available employment. H. R. Rep. No. 91-1402, 91st Cong., 2nd Sess., *reprinted in* [1970] U. S. Code Cong. & Ad. News, 6025, 6035. An express waiver was then enacted so that strikers would not be precluded from receiving stamps by the then-new work availability requirements. See p. 24, n. 18, *supra.* By contrast, although the entire unemployment compensation system, at both the federal and state levels, is predicated on the assumption that recipients will actively search for work and accept work offered or available to them, no similar waiver with regard to recipients of unemployment compensation exists. The states, accordingly, are not free to make special accommodations for striking employees without a similar mandate by Congress.

c. The Court of Appeals relied on the silent death of certain bills which would have had the effect of curtailing the payment of unemployment compensation to strikers. Contrasted against the strong federal policy protecting the collective bargaining mechanism from state interference, the silent failure of scattered bills offers insufficient probative evidence from which a conclusion can be drawn that Congress elected to permit an exception to the federal labor scheme in this area.[31]

31. The Court of Appeals also relied upon a singie reference to the existence of a New York unemployment compensation law in a Congressional report. It cannot be inferred, however, from that

(Footnote continued on next page.)

The silent background of these bills is sharply distinguishable (1) from *N. L. R. B.* v. *Drivers Local Union No. 639*, 362 U. S. 274 or *Malone* v. *White Motor Corp.*, 98 S. Ct. 1185 (1978),[32] where there existed strong and clear Congressional history, (2) from the vigorous legislative debates before the Food Stamp

(Footnote continued from preceding page.)
single reference in the Senate Report that Congress was aware of either the particular labor dispute provision in that New York statute or the effect that specific provision would have on the federal collective bargaining scheme in 1935. That report contains no reference to the coverage of striking workers by the New York statute, but merely cites the legislation as an example of the variety of means of properly *funding* the insurance plans. The funding scheme was, at that time, the primary concern of Congress. See p. 23, n. 17, supra.

Further, Congress in 1935 was not legislating against a background of general striker eligibility for unemployment compensation arising from the exercise of state police powers. Compare *Munn* v. *Illinois*, 94 U. S. 113 (1877). Hence, there was no reason for Congress to reinforce the existing preemptive barrier formed by the recently enacted Labor Act. Prior to 1935 Wisconsin was the only state which had legislated an unemployment compensation system, but its operation was delayed and abandoned pending Congressional consideration of a federal system. See R. Hoar, *Wisconsin Unemployment Insurance* (1934); Larson and Murray, "The Development of Unemployment Insurance in the United States", 8 Vand. L. Rev. 181, 184-186 (1955). Although the New York statute was enacted on April 25, 1935, the taxing provisions of the statute did not become effective until January 1, 1936, and no benefits were paid out until January 1, 1938. N. Y. State Dept. of Labor, *A History of Unemployment Ins. Legislation in the United States and New York States* (December, 1973). Thus, since striking employees were not then eligible or actually receiving unemployment compensation benefits under state programs, Congress could not have been aware of the intrusion into the federal collective bargaining scheme that such payments would effect.

32. In *Malone* the Court was confronted with the question whether the States were precluded from regulating the vesting terms of a pension plan by the doctrine of labor law preemption, if it was embodied in a labor contract. Unlike the instant case no special accommodation was at issue since all employer pension plans were subject to the same requirements. In permitting the exercise of the contested state authority the Court relied on the *express* authorization for state action contained in Sections 10(a) and (b) of the Pension Plans Disclosure Act of 1958, 72 Stat. 997. An intensive

(Footnote continued on next page.)

Act was approved,[33] or (3) from the "special legislative history" behind Congress' decision "to suffer a medley of attitudes and philosophies on [a different] subject" in *Retail Clerks* v. *Schermerhorn*, 375 U. S. at 104-105. Here no similar decision was made "to abandon . . . [national] uniformity". *Ibid.* As the First Circuit stated, the legislative history in this area "is not sufficiently clear to establish" (*Grinnell Corp.* v. *Hackett*, 475 F. 2d at 454) that such a decision was made with regard to the state intrusion at issue here. The barriers which stymied the Court in *Grinnell*, however, no longer exist. The factual record presented below establishes the "missing causal link" (*Grinnell Corp.* v. *Hackett*, 475 F. 2d at 459)—the availability of benefits dramatically affects the collective bargaining scheme. In the light of this conflict, the disputed state policy must fall.

(Footnote continued from preceding page.)
legislative history immediately preceding the enactment of those statutory provisions corroborated the conclusion. Hence state regulation was permitted, as the congressional debates stated, "whether or not [the pension plan] had been brought into existence through collective bargaining." *Malone*, 98 S. Ct. at 1192. By contrast the Court of Appeals in the instant case relied on fragments of legislative history which were scattered in both terms of time and subject matter. See, *e.g.*, p. 23, n. 17, *supra*. Accordingly, it cannot be said, as in *Malone*, that "Congress clearly envisioned the exercise of state regulation power" (98 S. Ct. at 1195) over the balance of economic power underlying the collective bargaining process. As the First Circuit stated, the pertinent legislative history is at most "ambiguous." See p. 21, *supra*.

33. See 115 Cong. Rec. 26845-26890 (Sept. 24, 1969); 116 Cong. Rec. 41981-42035 (Dec. 16, 1970); 116 Cong. Rec. 42121 (Dec. 17, 1970); 116 Cong. Rec. 44163-44170 (Dec. 30, 1970); and 116 Cong. Rec. 44430-44443 (Dec. 31, 1970).

CONCLUSION.

For each of the foregoing reasons, the Amici respectfully request that the save of the United States Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DEPARTMENT OF AGRICULTURE
Consumer and Marketing Service
Washington, D. C. 20250

May 24, 1968

Miss Linda Fredenberger
U. S. Chamber of Commerce
1615-H Street, N. W.
Washington, D. C. 20006

Dear Miss Fredenberger:

This is in response to your telephone inquiry about eligibility standards for the Food Stamp Program and the status of strikers.

The Food Stamp Act provides that the primary criterion of eligibility for participation in the program is "need," determined on the basis of family size and income. Under the Food Stamp Act, the State welfare agency is responsible for the certification of applicant food stamp families, using eligibility standards which have been proposed by the State welfare agency and approved by the Department of Agriculture. These standards include maximum net income limitations consistent with the income standards used by the State welfare agency in the administration of its Federally-aided public assistance programs. These standards also place a limitation on the resources to be allowed eligible households.

Families in which all members are receiving some form of welfare assistance are eligible to participate. Other low-income families may also be eligible if their income and resources do not exceed the established levels.

Thus, the family of a worker directly or indirectly affected by a labor dispute, work stoppage, or strike is not automatically eligible for food stamp benefits. Rather, it must be individually certified by the local welfare agency, using the established eligibility standards, to be in need of this food assistance. If the family is determined to be in need, there would be no basis for denying it participation in the program.

There is enclosed a table showing eligibility standards for a four-person household by State.

Sincerely yours,

/s/ JAMES E. SPRINGFIELD,
Deputy Director, Food,
Stamp Division.

Enclosure